

## Opening Address

### Equal Protection and the Anti-Civil-Rights Initiatives: Protecting the Ability of Lesbians and Gay Men to Bargain in the Pluralist Bazaar

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Rhonda got to do the fun part. A keynote speech is something you charge people up with, and Rhonda just did that.<sup>1</sup> I plan to talk about the basic legal attacks that one can make on anti-civil-rights initiatives. At the end I hope to have a little fun, but we're going to have to slog through a lot of constitutional law on the way.

When you think about these initiatives and the way they single out lesbians and gay men for totally different treatment in the political process, you think, "These initiatives are an equality problem, right? It's a natural." Indeed, it is a natural. The best way to think constitutionally about these initiatives is in terms of the Equal Protection Clause. First, I propose to talk about an important feature of these initiatives that makes it particularly appropriate to think about them in terms of equality. Second, I want to go through a little basic equal protection law just to make sure we're all on the same wavelength. For many of you this review will be a tiresome review of things you already know, so I'll try to be terse. Third, I want to quickly review different kinds of equal protection challenges one could raise to these initiatives, all of which have been tried in cases. I'll go over how they tend to work out and their strengths and weaknesses. Fourth, I'll talk briefly about one other way of looking at initiatives that I think is worth exploring. Finally, I'll say a few words to try to put the whole thing in a somewhat larger perspective—and I'll do it all in just a few minutes.

In the 1970s and the early 1980s, there was a slew of repeals of lesbian and gay civil rights laws.<sup>2</sup> It is hard to think about how to successfully challenge a repeal in court. Courts almost never require the passage of legislation, and they

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<sup>1</sup> See Rhonda R. Rivera, *Where Are We? Anti-Gay-Lesbian-Bisexual Ballot Attacks Today*, 55 OHIO ST. L.J. 555 (1994).

<sup>2</sup> In the late 1970s, lesbian and gay civil rights laws were repealed by voters in Dade County, Florida, Wichita, Kansas, St. Paul, Minnesota, and Eugene, Oregon. See Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 810 n.61 (1979).

are unlikely to ever forbid its repeal.<sup>3</sup> The first and maybe the most important thing to know about the recent initiatives is that none are aimed primarily at repealing nondiscrimination laws, although most of them incidentally have that effect. At their core they are an attempt to end the political game—to shut off political debate about whether there ought to be civil rights laws protecting lesbians and gay men—by taking away the power of government ever to consider passing these kinds of laws.

To begin thinking about challenging these initiatives as an equality problem, I want to go over three points of equal protection law and two little corollaries. The first point is: when you strip away the rhetoric, every equal protection test is based on the same thing. Every test involves looking at a classification—a line that the state has drawn to treat one group of people one way and another group of people differently—and asking whether that classification helps achieve the overall purpose of the law that uses it.<sup>4</sup>

You are all familiar with the idea that there are at least three different kinds of so-called tests that are used for equal protection cases. All of these tests compare classifications to the overall purpose of the law. The so-called strict scrutiny test, the toughest equal protection test, asks if the state can show that the classification is essential to achieve a compelling interest.<sup>5</sup> Take out “essential” and “compelling” and the question is whether the classification achieves the overall purpose of the law. The intermediate scrutiny test asks if the classification bears a substantial relationship to an important purpose.<sup>6</sup> The rational basis test asks if anyone could think that the classification might help achieve a legitimate purpose.<sup>7</sup> Take out the value words and all three tests ask if treating a group differently makes sense in terms of achieving the overall purpose of the law. If it does, all three tests then say it is equal treatment to

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<sup>3</sup> See *Reitman v. Mulkey*, 387 U.S. 369, 376 (1967); *id.* at 389–92 (Harlan, J., dissenting); see also *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *id.* at 396–97 (Black, J., dissenting).

<sup>4</sup> Some people think the idea that equal protection requires this limited form of similar treatment is a kind of practical gloss on the Fourteenth Amendment. See, e.g., Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343–44 (1949). Others think it stems from the kind of equality the Equal Protection Clause was meant to provide. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §16-1 (2d ed. 1988). I have always thought it is simply the straightforward application of our ordinary sense of what “equal” means; that is, not that two things are the same in every respect, but that they are the same in terms of a particular measuring standard. Thus, the statement  $1 + 1 = 2$  is sometimes true and sometimes untrue, just as is the statement  $1 + 1 = 10$ , depending on what we are testing for. (If you don’t get it, think digital.)

<sup>5</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967) (strict scrutiny test).

<sup>6</sup> See *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate scrutiny test).

<sup>7</sup> See *Heller v. Doe*, 113 S. Ct. 2637 (1993) (classic rational basis test).

treat the two groups differently. But if not, then it is not equal treatment to treat them differently, and the law has to include all or none. All three tests, in other words, are about comparing classifications to the purpose of the law.

The value words that distinguish the tests—compelling, important, legitimate, et cetera—tell us the standard for whether the classification serves the purpose and, at least with the most and least “strict” tests, who will have to meet it. The value words, I think, reflect the Supreme Court’s beliefs about when it is appropriate for judicial institutions to actively second guess policy decisions made by legislatures.<sup>8</sup> But the critical point here is not what justifies the value words or even how they alter the analysis, but rather that they do not change the basic inquiry, which is whether the classification helps achieve the overall purpose of the law.

The second point is: the Supreme Court’s general attitude toward enforcing the Equal Protection Clause is that in most circumstances it really won’t enforce it very much. I take the Court’s attitude to be that figuring out where to draw lines in legislation is the essence of the political process. “We won’t get in and reconsider those lines,” the Court generally says. It won’t ask whether different treatment really was based on a fair judgment about its necessity to achieve an end, unless it’s impossible that anyone could have thought to draw the line for a legitimate or fair reason. This attitude is the rational basis test. It is not an analysis of what the state did, but rather an analysis of what the state could have done: Could a rational legislature think that a legitimate end of the bill would be furthered by drawing the line here? If so, hands off. This test really leaves the state to enforce the Equal Protection Clause against itself.<sup>9</sup> The Fourteenth Amendment commands equal protection, so a state that pays attention to its obligations can classify a group only if in fact it thinks doing so will further the purpose of the law. But instead of asking what a state actually did, the Court asks only if what the state did is completely crazy—unexplainable in any rational way.<sup>10</sup>

The third point is: in some circumstances, courts will enforce the Equal Protection Clause much more aggressively. Sometimes, courts will ask whether the decision to treat a group differently was based on a fair judgment about whether treating the group differently helps achieve the overall purpose.

There are generally two circumstances in which courts will enforce the

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<sup>8</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–43 (1985).

<sup>9</sup> See *Kotch v. Board of River Port Pilot Comm’rs*, 330 U.S. 552 (1947) (creating a rational basis for rank nepotism); see also *Heller*, 113 S. Ct. at 2642–47 (giving its blessing to the *Kotch* “traditional” approach and then proceeding to use the “active” rational basis review that it says it disdains).

<sup>10</sup> See Laurence G. Sage, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1223 (1978).

Equal Protection Clause more aggressively. The first circumstance is when the court suspects (this is one of the times when jargon really fits quite well) that the group being hurt can't protect itself through the political process. The court believes that when this group goes into the horse trading of the political process, in which the court expects that people play out their agendas and take care of their own interests, this group for one reason or another can't do so. This belief of course is the so-called suspect classification doctrine.<sup>11</sup> If the court really is convinced that the disadvantaged group can't protect itself through the political process, then the court will be either moderately aggressive, as with gender discrimination,<sup>12</sup> or very aggressive, as with racial discrimination,<sup>13</sup> in requiring a real need to draw a line to justify some overall purpose.

The second circumstance for more aggressive enforcement of the Equal Protection Clause is when the court thinks a law involves selective access to or selectiveness about a fundamental constitutional right. At this point, the court says, "It's our job to enforce fundamental constitutional rights, so we will take a close look when it seems like the state is giving some people more access to, or greater exercise of, fundamental constitutional rights."<sup>14</sup> That's all the basic equal protection law we need to review, except for two little corollaries that I think are very, very important and usually get overlooked.

The first corollary is what I call the rule against improper purposes. It's really simple: if all of our equal protection tests are about looking at lines or classifications and asking whether they achieve the purpose of the law, then the state can never just take the line and make it the purpose. In other words, if you ask the state what purpose it is achieving by treating a group differently, the state can't answer, "We want to treat that group differently." If the state could say that, if it could just turn the classification into the purpose, then there would be no equal protection, or not much anyway. Every such classification, no matter what the level of analysis, would always fit the purpose perfectly. So the state can't invoke the classification as the purpose.<sup>15</sup> In cases this first corollary sometimes gets talked about as a rule against "hostile" purposes. I

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<sup>11</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). For a fine critique on the limitations of the suspect classification doctrine, see Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

<sup>12</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[T]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives.").

<sup>13</sup> See *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

<sup>14</sup> See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>15</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

don't like using the word hostile because it doesn't seem to me that one should have to show any venom dripping from the tongue, so to speak. All one should need to show is that there is no justification other than disadvantaging the group that is disadvantaged.

I call the second corollary the "Clinton Corollary" because it is like something that was important in his campaign. It's funny; it's the thing that lawyers most often miss about equal protection law. The Clinton Corollary says, "It's the classification, stupid!" Think about Colorado's Amendment Two, which says that state and local government can't pass antidiscrimination laws that benefit lesbians, gay men, and bisexuals.<sup>16</sup> It's not an equal protection question to ask: "Is there a legitimate purpose in *not* having antidiscrimination laws?" It is an equal protection question to ask, "Is there a legitimate purpose achieved by letting some people have antidiscrimination laws and not others?" Equal protection analyses are always about whether the *line* drawn achieves a legitimate purpose, not whether the whole scheme does. As I frequently say to myself when I'm thinking about equal protection problems, "It's the classification, stupid! Keep it in mind."<sup>17</sup>

That is our basic equal protection review. Let me now talk about ways to use basic equal protection law to challenge initiatives or, for that matter, any scheme to take away government's power to pass antidiscrimination laws benefiting lesbians and gay men. The first one comes right out of that little rule against improper purposes which I gave you a moment ago. A surprising number of the justifications that states and proponents have offered for these initiatives fall by the wayside simply by invoking the rule that the classification

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<sup>16</sup> Amendment Two provides:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b, *enjoined by*, *Evans v. Romer*, 60 Empl. Prac. Dec. (CCH) ¶ 41,998 (Colo. Dist. Ct.) (order granting preliminary injunction), *aff'd on other grounds*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993), 63 Fair Empl. Prac. Cas. (BNA) 753 (Colo. Dist. Ct. 1993) (order granting permanent injunction).

<sup>17</sup> For a good example of the Court insisting that the focus be on the classification, see *City of Cleburne*, 473 U.S. at 432. For a good example of the Court carefully finding a rational basis for the classification, see *United States R.R. Board v. Fritz*, 449 U.S. 166, 177-79 (1980).

can't be the purpose. Indeed, the State of Colorado's first justification for Amendment Two was that the people didn't want to have antidiscrimination laws that benefited lesbians and gay men.<sup>18</sup> My response to that—and I think it was correct—was, "That is a very interesting description of what the people want, but all you've done is invoke the classification as your purpose. You have said that your purpose for discriminating is that you want to discriminate. You can't do that."

Another great example of using the classification as the purpose is in the first of the reported initiative cases, the Riverside case.<sup>19</sup> The proponents in Riverside said, "Our purpose in passing this initiative is our belief that if the city of Riverside can't pass nondiscrimination laws, then lesbians and gay men will be less likely to live here, and we don't want them living here."<sup>20</sup> I think of this as the "get out of town" rationale. The California court said this reason was irrational.<sup>21</sup> I don't think it's irrational at all. I think, for example, that many lesbians and gay men have moved to San Francisco because they think it is a fairly warm and accepting place. I suspect many lesbians and gay men have moved out of Riverside because they thought it was a hostile place. Passing one of these initiatives is a hostile, not irrational, act. It's not irrational to think, "Fewer gay people will live here if we pass initiatives saying we don't want them to live here." It is saying that "we're passing this initiative because we don't like these people," thus using the classification as the purpose.

A remarkable number of purposes offered by defenders of these initiatives can be cleared away by the rule against improper purposes. Arguing improper purpose is important, not because it ultimately wins the case (it usually doesn't), but because it clears away a lot of the nonsense and begins to narrow the justifications.

You can also clear away nonsense with the second corollary I mentioned—"It's the classification, stupid!" Two justifications that the State of Colorado offered for Amendment Two, I thought, fell by the wayside under a traditional

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<sup>18</sup> Brief in Support of Defendants' Motion to Dismiss at 50, *Evans v. Romer*, 60 Empl. Prac. Dec. (CCH) ¶ 41,998 (Colo. Dist. Ct.) (No. 92 CV 7223), *aff'd on other grounds*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

<sup>19</sup> See *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 657-58 (Cal. Ct. App. 1991), *review denied*, No. S0-24940, 1992 Cal. LEXIS 1251 (Cal. Mar. 12, 1992). The proponents suggested that lesbians and gay men brought with them certain social ills and that the idea was to get them to take those problems elsewhere. *Id.* State preemption of local laws on such ills made it unnecessary for the court to think about the hard question of whether government can ever justify discrimination by invoking the collateral effects of prejudice. *Id.* at 658; see *City of Cleburne*, 473 U.S. at 448-50; *Pruitt v. Cheney*, 963 F.2d 1160, 1165-66 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992).

<sup>20</sup> See *Citizens for Responsible Behavior*, 2 Cal. Rptr. 2d at 658.

<sup>21</sup> *Id.*

rational basis analysis because the State failed to justify the classification at all. The first thing the State said was that it wanted to have uniform antidiscrimination laws and not little antidiscrimination laws all over the state that were different.<sup>22</sup> My response to that—and I think it was right—was, “That is all very interesting, but that is not what you did here. You didn’t say localities couldn’t pass antidiscrimination laws. You said they couldn’t pass antidiscrimination laws aimed at lesbians, gay men, and bisexuals. What you have to explain is not why you want to make all the rules at the state level, but why you want to say that *these groups only* can’t have rules made for them at the local level.” Of course, the other problem with the State’s argument is that it took away the state legislature’s power to pass antidiscrimination laws as well.

Next, the State said that it wanted to give people as much religious freedom as possible.<sup>23</sup> We scratched our heads and said, “What does it mean by that?” The State explained, “Well, we want people to have as much freedom of religion as possible. We want employers to be able to get rid of employees if they disapprove of them for religious reasons. We want to give people as much room as possible to do that and that is why we passed the law.”<sup>24</sup> Same answer. This argument might explain why it wouldn’t want to have employment discrimination laws, but that is not what it had to explain. It had to explain why *these groups only* can’t have an employment discrimination law, but anybody else can. The religious freedom argument also delighted us because we suspected that once the State started explaining what it meant, it might back itself out of an Equal Protection Clause problem and straight into a beautiful Establishment Clause problem.

The value of insisting that the focus be on the classification is that it keeps smoking them out. It strips away some purposes that are made up later and don’t really fit, forcing retreat to the frequently improper purposes that actually motivated the initiative. The two techniques may almost get you through the case. In the first round of the Colorado case, these techniques were getting us to the end because improper purposes were the only purposes the State came up

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<sup>22</sup> See Brief in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 27–32, *Evans* (No. 92 CV 7223).

<sup>23</sup> See Reply Brief at 22, *Evans v. Romer*, 854 P.2d 1270 (Colo.) (No. 935A17), *cert. denied*, 114 S. Ct. 419 (1993); Opening Brief at 42, *Evans* (No. 935A17); Trial Brief with Attachment at 69–73, *Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753 (Colo. Dist. Ct. 1993) (No. 92 CV 7223).

<sup>24</sup> See Reply Brief at 22, *Evans v. Romer*, 854 P.2d 1270 (Colo.) (No. 935A17), *cert. denied*, 114 S. Ct. 419 (1993); Opening Brief at 42, *Evans* (No. 935A17); Trial Brief with Attachment at 69–73, *Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753 (Colo. Dist. Ct. 1993) (No. 92 CV 7223).

with—"We don't want to have these laws, we want uniform laws, and we want to give people as much religious freedom as possible."

But eventually the State did come upon the three justifications people offer for these initiatives that cause some trouble when you think only about improper purposes or the need to explain the classification. The first problem comes out of the 500 pound gorilla of sexual orientation and constitutional law, *Bowers v. Hardwick*.<sup>25</sup> *Bowers*, as you all remember, is the United States Supreme Court case that says it's okay for states to criminalize sodomy, at least when it's committed by members of the same gender (I need to be careful with this description because the Court didn't deal with the question of whether states can criminalize sodomy more broadly).<sup>26</sup> The defenders of these initiatives argue, "The Supreme Court said in *Bowers*, at the very end of the opinion, that a majority of the Georgia electorate disapproving of gay people is a proper purpose. Therefore, we can invoke that purpose on the basis of *Bowers* despite your rule against improper purposes."<sup>27</sup>

My response is that even at its most frothingly crazy in *Bowers*, the Supreme Court didn't really say that it was okay to pass a sodomy law just because of disapproval of gay people. It said that it was okay to do it because of disapproval of sodomy.<sup>28</sup> That is not the same thing. Disapproval of a certain act is not the same as disapproval of a whole class of people in all circumstances. In any case, even if group disapproval were a permissible goal in a rational basis, due process case, in an equal protection case, simple group disapproval will never pass muster for the reasons we talked about earlier.<sup>29</sup> To allow group disapproval would be to read any requirement of equality out of the Constitution.

I think that is the right response. I think it ought to take care of the *Bowers* argument. But because *Bowers* is a Supreme Court case and because the rhetoric of it seems to display, and here I may be guilty of a tiny bit of understatement, a little hostility towards lesbians and gay men, it's worrisome. We run into a reaction from judges that "even though you got the technical answer right, it sure feels like the Supreme Court thinks it is okay to be hostile to lesbians and gay men."<sup>30</sup> So although it appears wrong, the argument that

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<sup>25</sup> 478 U.S. 186 (1986).

<sup>26</sup> *Id.* at 196.

<sup>27</sup> See Opening Brief at 25-28, *Evans v. Romer*, 854 P.2d 1270 (Colo.) (No. 93SA17), *cert. denied*, 114 S. Ct. 419 (1993).

<sup>28</sup> *Bowers*, 478 U.S. at 196. It says much about both the State of Colorado and the inability to defend these initiatives that in the Colorado Supreme Court, the State relied on *Bowers* more than any other case. See Opening Brief *passim*, *Evans* (No. 93SA17).

<sup>29</sup> See *supra* note 15 and accompanying text.

<sup>30</sup> No judge, of course, has said this in print, but see Judge Reinhardt's dissent in



pure hostility is allowable seems to linger around in the litigation.

Then there are the awful arguments that Colorado began to bring out when it saw it was losing. It argued that the purpose of Amendment Two was to protect the youth of Colorado.<sup>31</sup> Another purpose of Amendment Two, it said, was to protect families in Colorado.<sup>32</sup> We all know what the State was getting at although it tried very much not to spell it out. This stuff, of course, as a matter of fact is egregious nonsense. We all know it's egregious nonsense. The problem is that it is tough to invalidate something, under the rational basis test, just because in fact it is egregious nonsense. It has got to be such nonsense that you see the foam coming out of the mouth as the lawyer explains it.<sup>33</sup> In front of far too many judges, the notion that lesbians and gay men somehow represent a threat to children or family may not seem irrational.

I think that if the justification for treating a group differently is that the group carries some "class character flaw," somewhat more aggressive equal protection review is called for. I think I can build a solid case for that,<sup>34</sup> but it's a fairly untried idea, so the family and children arguments remain somewhat threatening. This may be a place where the proponents of these initiatives can get past a rational basis test.<sup>35</sup>

Finally, there is an argument that worries me greatly that the State of Colorado began to tumble to at the very end. That argument is, "We really do

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*Watkins v. United States Army*, 837 F.2d 1428, 1451 (9th Cir. 1988) (Reinhardt, J., dissenting), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990).

<sup>31</sup> *Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753, 759 (Colo. Dist. Ct. 1993).

<sup>32</sup> *Id.* at 755, 758-59.

<sup>33</sup> *See, e.g., Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947); *see also Heller v. Doe*, 113 S. Ct. 2637 (1993).

<sup>34</sup> Few arguments are more likely to be based in prejudice than those which depend on the idea that all members of a class carry an inherent "character flaw." Think about the government's rationales in *Korematsu v. United States*, 323 U.S. 214 (1944). Isn't the "suspicion" that this kind of argument is typically behind prejudice a satisfactory justification for the sort of heightened scrutiny the Court used in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973)?

<sup>35</sup> Maybe not. Class character flaw rationales are often rejected using an aggressive form of rational basis review. *See, e.g., Burstyn v. City of Miami Beach*, 663 F. Supp. 528 (S.D. Fla. 1987) (rejecting the argument that the elderly as a class allegedly discourages tourism and commerce). The problem is that, although there is a good argument for more aggressive review in these cases, courts not only typically fail to articulate it, they usually describe the decisions as based on the rule against improper purposes, or a classic rational basis analysis, both of which they clearly are not. *See, e.g., City of Cleburne*, 473 U.S. at 432. *But see J.W. v. City of Tacoma*, 720 F.2d 1126, 1128-30 (9th Cir. 1983). Because the class character flaw doctrine is largely subtextual, it is tough to rely on.

not want to have any civil rights laws here in Colorado which go beyond what the federal government has. We just want to have discrimination in employment and housing prohibited when the federal government prohibits it."<sup>36</sup> Now, of course, Amendment Two does not federalize Colorado civil rights law, it only gets rid of one kind of law. There is, however, a corollary doctrine in equal protection law called the "One Step at a Time" doctrine. A few of you may have run across it. It says that if the state sees a threat to some legitimate interest, it can move in a piecemeal fashion to take care of it.<sup>37</sup> I've been worried that the defenders of Amendment Two might put the "we just want to have federal rights" rationale together with the "One Step at a Time" doctrine. The argument would go something like, "The reason we just passed this law against lesbians and gay men is that they've begun to succeed. They've gotten several cities to pass laws and we want to get rid of these laws as a preliminary step to federalizing our civil rights laws."

We should be able to cope with this argument even with a minimum level of equal protection review because the explanation does not say why the state needed to preemptively foreclose civil rights laws protecting lesbians and gay men, while keeping laws already on the books that go well past federal law. Although I think this amounts to saying the state has still failed to justify the classification, it looks like we are saying the classification wasn't precise enough—an argument you can't make on rational basis.<sup>38</sup> So there is a real danger that a court might accept the combined argument as a rational basis for one of these initiatives.

That possibility left us saying that we had to somehow get past rational basis. We had to get courts to look at these initiatives in a much more aggressive way, because we could lose these cases even after eliminating some of the deadwood arguments.

The suspect classification doctrine seems like a natural. Here we've got state constitutions and city charters being amended to say that legislatures can't pass laws to protect lesbians and gay men from discrimination. If ever a group

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<sup>36</sup> See Trial Brief with Attachment at 64-67, *Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753 (Colo. Dist. Ct. 1993) (No. 92 CV 7223). Defendants don't quite make this argument; but they contend that they ought to be allowed to limit the cities' power to pass antidiscrimination laws in the absence of a national consensus. This contention comes quite close, especially since Amendment Two bans the state from passing such laws.

<sup>37</sup> See *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

<sup>38</sup> Compare *City of Cleburne*, 473 U.S. at 432 with *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980). In *Fritz*, the Court believes it has a rationale for why an arguably underinclusive law drew its lines where it did. The fact that it might truly have been underinclusive is irrelevant given the explanation. In *Cleburne*, it was not actual underinclusiveness so much as the failure to explain the line which invalidated the law.

looked like it couldn't protect itself in the political process, this was the group. Losing a few elections, even those involving constitutional amendments like Amendment Two, may not be enough to invoke suspect classification. But it would not be hard to show much more comprehensively that lesbians and gay men can't protect their interests by just playing the pluralist game. So suspect classification looks like a natural way to argue for more aggressive review. The problem is we've been trying that for fifteen years and pretty regularly losing it.<sup>39</sup> Worse, we've been losing it sort of in a rush after *Bowers*.<sup>40</sup> Now, I'll come back to this in a little while, but I think all of us looked at it and said we had to come up with another way of thinking about this issue.

The other way of thinking about it is the theory that underpins the decision by the Colorado Supreme Court in *Evans v. Romer*.<sup>41</sup> I want to walk through that because, at least at the moment, it's the most important of the equal protection theories because it achieves aggressive review. It's a way of getting at these initiatives.

The theory of the Colorado case starts with an offhand remark from the Supreme Court case, *Hunter v. Erickson*.<sup>42</sup> *Hunter*, I hope you know, is the first Ohio initiative case, from Akron. This initiative, passed in the 1960s, repealed a nondiscrimination law that prohibited discrimination in housing based on race and religion and amended the city charter to say that to pass any laws about housing discrimination based on race or religion, the city council needed a vote of the people.<sup>43</sup>

That initiative went to the Ohio Supreme Court which unfortunately upheld it,<sup>44</sup> but it then went on to the United States Supreme Court, which struck it down using the suspect classification doctrine.<sup>45</sup> The Court said, "Look, this initiative is a classification based on race and religion, and race is the classic suspect classification. There is no compelling purpose served by saying that only nondiscrimination laws based on race have to be passed by a vote of the people."<sup>46</sup>

*Hunter* was a great case, but not all that helpful to us because it's about a suspect classification. But at the very end of the opinion, after striking the

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<sup>39</sup> See, e.g., *DeSantis v. Pacific Tel. and Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

<sup>40</sup> See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570-74 (9th Cir. 1990).

<sup>41</sup> 854 P.2d 1270 (Colo.), cert. denied, 114 S. Ct. 419 (1993).

<sup>42</sup> 393 U.S. 385 (1969).

<sup>43</sup> *Id.* at 386.

<sup>44</sup> *State ex rel. Hunter v. Erickson*, 233 N.E.2d 129 (Ohio 1967), rev'd, 393 U.S. 385 (1969).

<sup>45</sup> *Hunter v. Erickson*, 393 U.S. 385, 389-93 (1969).

<sup>46</sup> See *id.*

amendment down on the basis of race, there was a very interesting little passage in which the Court says that the state can no more take away a group's ability to pass favorable legislation through the political process than it can take away the group's right to vote.<sup>47</sup> The Court then cites to apportionment and voting rights cases.<sup>48</sup>

You look at that argument and think it is a very interesting idea. The most interesting thing about it is that all those voting rights and apportionment cases aren't suspect class equal protection cases. They're fundamental rights equal protection cases. In other words, going back to what I said a minute ago, these are cases in which the courts get very aggressive in reviewing classifications, not because of the group being disadvantaged, but because of the activity involved.<sup>49</sup>

Now, even more interesting, there is no right in the federal constitution to vote in state elections. You may be surprised to hear this fact, but the federal constitution doesn't say anything about people having the right to vote in state elections. Where did that "fundamental right" come from then? Go back and read the original reapportionment case, *Reynolds v. Sims*.<sup>50</sup> The Court in *Reynolds* indeed didn't say that there is anything magical about voting. Instead it said that the basic premise of the federal constitution is democratic self-government.<sup>51</sup> That premise, the Court said, is basic to the republic created by the Constitution and to the states which created the federal system.<sup>52</sup> It is a premise on which all of the states are supposed to operate. Then the Court says that if the system of government is a republican system, a representative system, the only real way to participate in self-government is by voting.<sup>53</sup> Therefore, the Court says that the right to vote in state elections is fundamental, not because voting in itself is magical, but because the basic assumption of the system is a right to self-government.<sup>54</sup>

When you read this part of *Reynolds*, that offhand remark in *Hunter* begins to make sense, at least it did to everyone working on the Colorado case. The *Hunter* Court was making an observation that makes common sense. There are two ways to take away a group's power to participate in self-government in a representative system. One would be to take away votes. The other would be to go to the legislature and take away its power to ever enact legislation on the

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<sup>47</sup> *Id.* at 393.

<sup>48</sup> *Id.*

<sup>49</sup> See *supra* text accompanying note 14.

<sup>50</sup> 377 U.S. 533 (1964).

<sup>51</sup> *Id.* at 564-65.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

group's behalf. In the latter case, the group still has a right to vote, but the right to vote is a charade because the group can't get anything with it.

That observation fits neatly not only into the apportionment cases, but also into the fundamental premise, the Madisonian premise, that animates the federal constitution itself. Reread *The Federalist Papers*.<sup>55</sup> The idea is that we're going to have a pluralist system made up of many different factions who will work, bargain, and trade, if you will, with other factions in order to achieve their aims through the political process.<sup>56</sup> Now, one way to disable a faction from working in a pluralist process is by taking away its power to vote. Then it doesn't bring anything to the table with which to trade. But another way to do it is by taking away its ability to achieve the ends. Now it doesn't have anything to get at the table. It's a little sneakier, but basically it's the same end.

Of course, Amendment Two doesn't entirely take away the ability to participate in the system. It only takes the ability to get one kind of protective legislation, but it's an important kind of protective legislation. Remember, you don't have to entirely take away somebody's right to vote to get in trouble in the right to vote cases, all you need to do is to dilute or seriously weaken it.<sup>57</sup> The theory of the Colorado case was: "You have seriously weakened or diluted somebody's right to participate in democratic self-government if you take away the legislature's power to pass protective legislation as to them."

That basically is what the Colorado court says in *Evans v. Romer*.<sup>58</sup> It says that this initiative gets subjected to the toughest, strictest kind of judicial review, not because of the group that it disadvantages, but because it's really getting at the core of a person's right to participate in democratic self-government by taking a major agenda item of that person off the table and forbidding government from enacting it.<sup>59</sup>

It's a theory—I'm fond of it obviously—that I think makes a lot of sense. It makes a lot of sense because it describes quite accurately what the initiatives are about. The initiatives are about responding to the way in which the lesbian and gay community has turned to the political process. They say, in effect, "We're going to beat you and we're not going to beat you by defeating you as you move for antidiscrimination laws, we're going to beat you by ending the game, by taking you out of the process."

As satisfactory as I think the Colorado theory is, it has a problem. I want to mention the problem and what I think is the answer to the problem briefly

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<sup>55</sup> See, e.g., THE FEDERALIST Nos. 10, 51 (James Madison).

<sup>56</sup> *Id.*

<sup>57</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>58</sup> 63 Fair Empl. Prac. Cas. (BNA) 753 (Colo. Dist. Ct. 1993).

<sup>59</sup> *Id.* at 754–55.

and then move on. The problem with the Colorado theory is summed up by another Supreme Court case, *James v. Valtierra*.<sup>60</sup> *James* deals with another one of those crazy California initiatives. It seems like every time you feel like you're able to accomplish something good in this area, you stumble against a case that comes from one of those crazy California initiatives. This was an initiative passed in the very early 1950s and it said that for a state public body to build low income housing in a city, it had to get a vote of the people.<sup>61</sup>

If you think about it, the initiative in *James* looks like a selective mandatory initiative because not housing, rather low income housing, is covered. Unfortunately the United States Supreme Court upheld this initiative,<sup>62</sup> two years after *Hunter* and after the reapportionment cases.

Now trust me on this. If we want to talk about it later, I will. *James* can be dealt with in all those traditional, good lawyerly ways. It can be, as we like to say when we're litigating, "distinguished." I think it can be distinguished very, very convincingly, *except* that *James* gives voice to an intellectual problem with the whole theory of the Colorado case. We need to have a good answer for that.

The intellectual problem stems from what I think is a lawyer's parlor trick. Here's the problem. Our opponents say, "The problem with your theory, is that it destroys every substantive limit on the power of state legislatures to pass legislation." State constitutions are full of things saying the legislatures can't do this, can't do that, can't do something else. Our opponents argue, "Your theory will invalidate all of those things and any theory that invalidates all limits on state governmental power has got to be wrong."

Of course, the fundamental premise of our Colorado argument is to protect the ability of people to participate. It shouldn't be about substantive results or substantive limitations on state government. In other words, we're not protecting people's ability to win political disputes, just to participate.

Here's the parlor trick. Our opponents argue that this theory will get rid of all substantive limits on state legislatures by saying, "Look, we can take any substantive limit on state legislation and turn it into a class." Watch. Take Amendment Two and let's take lesbians, gay men, and bisexuals out of it, and suppose Amendment Two just said, "Neither the State of Colorado nor any of its political subdivisions shall pass any laws on antidiscrimination." Does this disadvantage any particular group? We would say, "No, not any more, you've taken the group selectivity out of it." But they say, "Sure it does! It disadvantages those who favor antidiscrimination laws or those who might

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<sup>60</sup> 402 U.S. 137 (1971).

<sup>61</sup> *Id.* at 139.

<sup>62</sup> *Id.* at 140-43 (holding that initiatives reflect a procedure for democratic decisionmaking that does not violate the Equal Protection Clause).

benefit from them.”

Like I said, I think this is a parlor trick. It takes a theory that is about protecting people from selective disadvantages in the process and making selective limitations that aren't obviously selective, based on how people feel about the results they control or the extent to which they might be benefited by the substantive results they control.

Therefore, we need to say as part of the Colorado theory that it protects any class of people *except* a class simply created out of a substantive limitation by talking about those who favor it, or those who oppose it, or those who would benefit by it, et cetera. We also need to explain why, in terms of the underlying theory of the Colorado case, it makes sense to draw the line here—not to protect groups who are defined just by their relationship to a substantive limitation on power. I won't go into that anymore except to say that it can be done and that it is a good answer to the objection and to *James* as well. But it's an answer that, at least so far, I don't think has been made convincingly. I don't think it's made convincingly by the Colorado Supreme Court in *Evans*,<sup>63</sup> and it needs to be made very convincingly in somewhat greater detail than I just did here, if that theory is ever going to survive in the United States Supreme Court. The United States Supreme Court is not going to accept a theory which it thinks would destroy every substantive limit on state constitutional power.

This problem brings me back to something that I said I was going to postpone: the suspect classification doctrine.<sup>64</sup> Let's take another look at the suspect classification doctrine, because what is really offensive about these initiatives is not just that they interfere with the political process, but that they interfere with the participation of this particular group in the political process.

If there were ever cases with which we might win suspect classification, these seem to be the ones. These initiatives really do speak directly to the notion that the doctrine is about the ability to protect ourselves in the political process. Hell, we're being made the official pariahs, the official outcasts from the political process. These initiatives are a device that is almost designed to create a suspect classification. It seems a pity to let the argument go by the boards or not be made in the cases that give the best chance of actually succeeding.

The problem, I think, is that while a lot of us feel that ultimately we can convince the courts that *Bowers v. Hardwick*<sup>65</sup> doesn't tell us anything about suspect classifications, it's a bad time to do that right now. The courts need a little more distance from *Bowers* and thus we're still going to have a lot of

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<sup>63</sup> *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

<sup>64</sup> *See supra* text accompanying notes 11–13.

<sup>65</sup> 478 U.S. 186 (1986).

trouble with suspect classification.<sup>66</sup>

So I make a very practical suggestion. I suggest to people litigating these cases to try to avoid the suspect classification issue. My way of trying to avoid it is to move for a preliminary injunction based on political participation, rational basis, and improper purpose. If you get the preliminary injunction on that basis, then move for summary judgment. First, do a little discovery to get the defenders of the initiatives to say what their purposes are. The odds are you will be able to live with whatever they say their purposes are. Build your arguments around them, and then move for summary judgment. If you do that, you preserve your ability to argue suspect classification if you lose at some point because you won on a preliminary motion. But if you keep winning, you never have to reach it and confront the possibility of getting one more nail in the suspect classification coffin with another bad decision.

If you lose the summary judgment motion, well go ahead and make the suspect classification argument. But if you do go ahead, make it very carefully and very thoughtfully. Don't get caught in the immutability quagmire, which is a lot of nonsense. Quite honestly, no Supreme Court decision has ever said that immutability is an essential characteristic of a suspect class. And if you think about what the suspect classification doctrine is about—I keep saying to my classes at Hastings that one can't actually be a good litigator unless able to think about things at the level of theory because the hard questions always require that thought—protecting groups that can't protect themselves in the political process, there is no reason why immutability ought to be an essential characteristic. So many of our cases on suspect classification have wasted enormous amounts of energy and time and concentration screwing around with something that just is not very important in theory or in doctrine and winds up as a side show that saps energy from making a really convincing, comprehensive case aimed at the point.

The point, again, is the ability to protect oneself in the political process. That's where the comprehensive case has to be made. And it must be made, in my last practical note for people who are thinking about it, like any other

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<sup>66</sup> But see *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 65 Fair Empl. Prac. Cas. (BNA) 1167 (S.D. Ohio 1994) (concluding, despite *Bowers*, that gays, lesbians, and bisexuals qualify for quasi-suspect status and that any laws making a distinction on sexual orientation must be subjected to intermediate scrutiny). This conclusion, however, has been made in other courts as well, only to be reversed or dodged by courts of appeals. See *Watkins v. United States Army*, 837 F.2d 1428, 1451 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 111 S. Ct. 384 (1990); *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (1992), *cert. denied*, 113 S. Ct. 2445 (1993); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990).



argument about constitutional theory—you file it, you don't try it. We don't have a trial over whether you need a clear and present danger of imminent lawless conduct in order to prohibit speech on the basis of its content. That's constitutional doctrine. It's doctrine that's informed by a lot of factual information, but you don't have trial courts make findings on that doctrine on a case-by-case basis.

You don't have suspect classification doctrine found on a case-by-case basis either. There are lots of ways in which good litigators use their trial records to get in the evidence needed to support suspect classification arguments. But you make the argument through what you file, you make it through what used to be called a Brandeis brief, not through proposed fact findings. If you need to make a suspect classification argument, then make it and do it carefully. But if you can avoid doing it by winning without it, at least at this stage of the game, do that.

Let me say really quickly, I think there is one other promising way to think about equal protection in these initiatives, which I'm working on with other litigators and other academicians. That theory is to say that what causes equal protection suspicions about these kinds of initiatives is not just the process and not just the group, but what they take away. Collapsing this down to just a bit of its skeleton, antidiscrimination laws are the single most important tool that states have for enforcing the Equal Protection Clause. If you go back to some of my equal protection review from the beginning, you remember that I said that, for the most part, the courts don't enforce it, rather they leave it to the states to enforce it on themselves.<sup>67</sup> The tool the states use to enforce the requirements of the Equal Protection Clause on themselves are antidiscrimination policies. The idea is that if you take away the power of the states to enforce equal protection on themselves with antidiscrimination policies, that action ought to be presumptively invalid.

There is a more elaborate case to be made here. I won't review it now, but I do think it is a promising argument and we have to be ready when one of these cases gets up to the Supreme Court. The nice thing about it is that it's more limited than the Colorado argument, more limited in the sense that all you tell people they can't do is take away the state's power to pass antidiscrimination laws.

I appreciate you bearing with me. Now I want to say one more thing about context. I said at the beginning of this speech that I thought the really important aspect of these initiatives was that they take away government's power to pass antidiscrimination laws and that I wasn't talking about simple initiatives that repeal antidiscrimination laws. You know, I not only think that none of these theories work very well on simple repeals, I think that lawyers shouldn't be the

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<sup>67</sup> See *supra* text accompanying notes 9–10.

main focus when the issue is a simple repeal.

There is a remark that I frequently hear that used to puzzle me a lot. Now I'm going to be confessing a part of my personality that's the deepest law nerd part, so you'll have to be kind to me here. I used to hear people say, "People's civil rights to nondiscrimination should never be subject to popular approval." I used to scratch my head and say, thinking of it as a law nerd, "Well, what's wrong with that, they always are." Nondiscrimination laws are always passed by legislatures, and that, in essence, is popular approval one step removed. There is no constitutional right to nondiscrimination laws (well, there might be actually, but there's none that's enforced by the courts). Nondiscrimination laws are always subject to popular approval.

At some point in my life, as I got older, I began to think that my nerd reaction—"of course these things are always subject to popular approval, they're passed by legislatures"—was not only right in a law nerd sense, but right in a real sense as well. I think it's a sad fact, as much as we would like it not to be the case, that courts and legislatures don't change society. They help, but they don't change society. It's very important for all of us to recognize that.

Forty years ago the United States Supreme Court said we weren't going to have a racially segregated society anymore.<sup>68</sup> Did it happen? Well, it certainly didn't happen forty years ago, and by my lights it's nowhere near there today. In 1964, the United States Congress said we're not going to have any race or sex discrimination in employment.<sup>69</sup> Gone? That was 1964, thirty years ago. Courts and legislatures undoubtedly make pronouncements about rights and how society is structured. But in the end, every civil rights movement, is about persuading people that tolerance is the consummate American value. Every civil rights movement in the end, is about changing people's minds and changing the way they think. Courts and legislatures are helpful, but they are not the end of the game.

We have to recognize that there is no short circuit to civil rights. There is no way we can get our smart, hot litigators in there and get them to do it for us. Even if they win, the court victory isn't going to change society. The difficult "shoe leather" fight that goes on at the most basic political level—on the street in the precincts—is going to have to continue.

Now, I don't mean to say that there is nothing for lawyers to do. I think the Florida case is one of the most important cases we've had;<sup>70</sup> I think the

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<sup>68</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>69</sup> Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2 (1988 & Supp.V 1993)).

<sup>70</sup> *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) (defeating the Florida 1994 initiative on a pre-election challenge).

Colorado case is an important case too.<sup>71</sup> But I think we need to recognize that the main functions for lawyers in the lesbian and gay rights movement have got to be two. One is to use courts and legislatures as a forum for arguing the legitimacy of our claims to nondiscrimination to the wider public. Two, perhaps more important, is to make sure we're able to continue to play in the political game, and to continue the process of persuasion. Furthermore, we need to keep our minds focused on the fact that ultimately, the process of persuasion is the way we achieve rights. Thank you.

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<sup>71</sup> Evans v. Romer, 63 Fair Empl. Prac. Cas. (BNA) 753 (Colo. Dist. Ct. 1993).

